A

GHANASEKARAN KRISHNASAMY

v.

SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
C [CIVIL APPEAL NO: W-01-98-2007]
19 JANUARY 2009

ADMINISTRATIVE LAW: *Exercise of administrative powers - Domestic discipline - Condonation - One year delay in charging public*
D *servant with disciplinary offences - Whether such delay evidenced condonation of public servant's offences - Whether delay a ground for declaring disciplinary action null and void - Whether delay a ground for setting aside order of dismissal*

E ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Domestic discipline - Public servant admitting to disciplinary offences - Whether public servant had a right to be heard in mitigation before Disciplinary Board made decision - Whether public servant ought to be allowed application to amend writ for unjust dismissal to plead no*
F *opportunity to mitigate before punishment - Whether such amendment an exercise in futility - Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 26*

CONSTITUTIONAL LAW: *Public servants - Disciplinary proceedings - Condonation - One year delay in charging public servant with*
G *disciplinary offences - Whether such delay evidenced condonation of public servant's offences - Whether delay a ground for declaring disciplinary action null and void - Whether delay a ground for setting aside order of dismissal*

H ***CONSTITUTIONAL LAW:*** *Public servants - Disciplinary proceedings - Whether public servant had a right to be heard in mitigation before punishment - Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 26*

I

PUBLIC SERVANTS: *Disciplinary proceedings - Procedure - Condonation - One year delay in charging public servant with disciplinary offences - Whether such delay evidenced condonation of public servant's offences - Whether delay a ground for declaring disciplinary action null and void - Whether delay a ground for setting aside order of dismissal*

PUBLIC SERVANTS: *Disciplinary proceedings - Procedure - Public servant not given opportunity to mitigate before Disciplinary Board made decision - Whether public servant had a right to be heard in mitigation before punishment - Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 26*

The appellant public officer was asked to show cause by letter of 26 June 1992 why he ought not be dismissed or demoted from service for being absent without permission from his place of duty and for punching a senior officer. These acts of misconduct occurred in May 1991. By letter dated 15 July 1992, the appellant admitted he had committed the disciplinary offences, explained the circumstances of their commission, prayed for forgiveness and undertook not to repeat the offences. He was however dismissed from the service. His subsequent appeal to the Disciplinary Appeal Board was also dismissed. The appellant then filed an action in the High Court alleging *inter alia* that the dismissal was unlawful, void and of no effect. In the High Court, the appellant's counsel orally applied to amend the statement of claim to plead another ground for nullifying the dismissal, namely, that the appellant was not given an opportunity to make a plea in mitigation before he was dismissed. The High Court initially postponed its decision on the application pending the Federal Court's decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal ('Utra Badi')* but subsequently dismissed the application post *Utra Badi*. The High Court also dismissed the appellant's case. The appellant appealed to the Court of Appeal contending that: (i) he had a right to be heard in mitigation before he was dismissed and that the High Court Judge misdirected himself in dismissing the application; (ii) the one year delay in the commencement of disciplinary proceedings against the appellant was fatal; and (iii) the delay amounted to condonation of the alleged offences by the appellant, thereby precluding the respondent from instituting disciplinary proceedings against the appellant.

Held (dismissing the appeal with costs)
Per Mohd Ghazali Yusoff JCA:

(1) In light of the decision in *Utra Badi*, the High Court Judge was clearly not wrong when he concluded that the proposed amendment to the statement of claim would be an exercise in futility and dismissed the application. The contention that the learned judge misdirected himself could not stand at all. *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (foll). (paras 13 & 14)

(2) In the instant appeal, the delay was only for about one year. The appellant admitted committing the offences which he was charged with. Further, there was no allegation of bad faith on the part of the respondents that might nullify the dismissal. Under such circumstances, the High Court judge did not err in his finding on the issue. *M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor* (dist). (para 16)

(3) Delay *per se* is not a ground for holding that the disciplinary action be null and void and to set aside the decision. Delay does not also amount to condonation. In the instant case, there was no condonation in any form whatsoever. There was no evidence that all was forgiven. The appellant had admitted committing the disciplinary offences and the decision of the disciplinary action was given after careful consideration of the show cause letter and his representation. Further, the appellant punching his senior officer was a serious offence punishable as voluntarily causing hurt under the Penal Code. *M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor* (not foll); *Public Service Commission Malaysia and Anor v. Vickneswary RM Senthivelu (menggantikan M Senthivelu R Marimuthu (si mati))* (foll). (paras 17 & 18)

(4) In the instant case, no injustice had been occasioned to the appellant. The disciplinary proceedings conducted against the appellant were in compliance with the General Orders. The High Court Judge was correct in holding that there were no improprieties in the disciplinary proceedings conducted against the appellant. (paras 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang pegawai awam, telah diminta untuk tunjuk sebab oleh surat bertarikh 26 Jun 1992 kenapa beliau tidak patut dibuang kerja atau diturunkan pangkat kerana tidak hadir tanpa kebenaran di tempat kerjanya dan kerana menumbuk seorang pegawai kanan. Perbuatan-perbuatan salah laku ini berlaku pada Mei 1991. Melalui surat bertarikh 15 Julai 1992, perayu mengaku telah melakukan kesalahan-kesalahan tatatertib itu, menjelaskan halkeadaan perbuatan itu, memohon kemaafan dan berjanji untuk tidak mengulangi kesalahan-kesalahan itu. Beliau, walau bagaimanapun, dibuang kerja. Rayuan kemudiannya ke Lembaga Rayuan Tatatertib juga telah ditolak. Perayu selepas itu memfail suatu tindakan di Mahkamah Tinggi mengatakan, antara lain, bahawa pembuangan kerjanya menyalahi undang-undang, tak sah dan tidak berkesan. Dalam Mahkamah Tinggi, peguam perayu memohon secara lisan untuk meminda pernyataan tuntutan untuk memplid satu lagi alasan untuk membatalkan pembuangan kerja itu, iaitu, bahawa perayu tidak diberi peluang untuk membuat rayuan meringankan hukuman sebelum beliau dibuang kerja. Mahkamah Tinggi pada mulanya menangguhkan keputusannya mengenai permohonan itu sementara menunggu keputusan Mahkamah Persekutuan dalam *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* ('*Utra Badi*') tetapi kemudiannya menolak permohonan selepas *Utra Badi*. Mahkamah Tinggi juga menolak kes perayu. Perayu merayu ke Mahkamah Rayuan menghujah bahawa: (i) beliau mempunyai hak untuk didengar tentang peringanan hukuman sebelum beliau dibuang kerja dan bahawa Hakim Mahkamah Tinggi telah menyalaharahkan dirinya sendiri dalam menolak permohonan itu; (ii) kelewatan selama satu tahun dalam memulakan prosiding tatatertib terhadap perayu ialah fatal; dan (iii) kelewatan itu merupakan pemaafan kesalahan-kesalahan yang dikatakan telah dilakukan oleh perayu, dan dengan itu menghalang responden dari memulakan prosiding-prosiding tatatertib terhadap perayu.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohd Ghazali Yusoff HMR:

(1) Memandangkan keputusan dalam *Utra Badi*, Hakim Mahkamah Tinggi jelas tidak salah apabila memutuskan bahawa pindaan kepada pernyataan tuntutan yang dicadangkan itu tidak berguna dan menolak permohonan itu. Hujahan bahawa yang

arif hakim menyalarahkan dirinya sendiri langsung tidak dapat bertahan. *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (diikuti).

(2) Dalam rayuan ini, kelewatan itu selama hanya satu tahun. Perayu mengaku melakukan kesalahan-kesalahan yang beliau telah dituduh dengan. Tambahan lagi, tiada apa-apa pengataan mengenai niat jahat di pihak responden yang boleh membatalkan pembuangan kerja itu. Di bawah keadaan sebegitu, hakim Mahkamah Tinggi tidak khilaf mencapai keputusannya atas isu itu. *M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor* (dibezakan).

(3) Kelewatan *per se* tidak merupakan alasan untuk memutuskan bahawa tindakan tatatertib itu batal dan tak sah dan untuk mengenepikan keputusan itu. Kelewatan juga tidak merupakan pemaafan. Dalam kes ini, tidak ada pemaafan dalam mana-mana cara pun. Tidak ada apa-apa keterangan bahawa semua telah dimaafkan. Perayu telah mengaku melakukan kesalahan-kesalahan tatatertib dan keputusan tindakan tatatertib itu diberi selepas pertimbangan teliti surat tunjuk sebab itu dan representasinya. Tambahan lagi, perayu menumbuk pegawai kanannya merupakan sesuatu kesalahan serius yang boleh dihukum sebagai menyebabkan kesakitan dengan sengaja di bawah Kanun Keseksaan. *M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor* (tidak diikuti); *Public Service Commission Malaysia and Anor v. Vickneswary RM Senthivelu (menggantikan M Senthivelu R Marimuthu (si mati))*. (diikuti)

(4) Dalam kes ini, tidak ada apa-apa ketidakadilan yang telah dilakukan kepada perayu. Prosiding-prosiding tatatertib yang dijalankan terhadap perayu mematuhi Perintah-perintah Am. Hakim Mahkamah Tinggi betul dalam memutuskan bahawa tiada apa-apa ketidaksopanan dalam prosiding-prosiding tatatertib yang dilakukan terhadap perayu.

Case(s) referred to:

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi Perumal [2001] 2 CLJ 525 FC ***(foll)***

M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor [2005] 3 CLJ 778 CA ***(dist)***

Patto Perumal v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1989] 1 CLJ 42; [1989] 2 CLJ (Rep) 224 HC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(foll)***

Legislation referred to:
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 26(3), (4)

For the appellant - Karpal Singh (Sanjeet Kaur Deo with him); M/s Karpal Singh & Co
For the respondents - Nik Mohd Nor Nik Kar SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-21-115-1993]

Reported by Andrew Christopher Simon

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] This is the judgment of the court. It is a unanimous decision.

The Facts

[2] In 1974 the appellant commenced employment with the Government of Malaysia, the 2nd respondent as a general labourer. Later, in 1976, he held the post of a security guard, *viz*., a timescale security officer in the Administration and Finance Division of the Prime Minister's Department.

[3] By letter dated 26 June 1992 he was asked to show cause, pursuant to O. 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the General Orders"), why he ought not be dismissed from service or demoted upon the following charges, namely:

(a) that on 9 May 1991 he was absent from his place of duty without permission between 7.10am and 7.30am (the 1st charge); and

(b) that on 15 May 1991 at 6.55pm he punched Mat Simin bin Jaafar, a senior security officer (the 2nd charge).

[4] The appellant responded to the show cause letter by letter dated 15 July 1992 wherein he admitted that he committed the disciplinary offences and explained the circumstances of its commission. He then prayed for forgiveness and undertook not to repeat the offences.

[5] On 21 August 1992 the disciplinary board found him guilty of the two charges and imposed the punishment of dismissal. He was informed by letter dated 5 September 1992. His appeal to the disciplinary appeal board was dismissed. He was informed by letter dated 1 April 1993.

[6] On these facts, the appellant sought a declaration in the High Court against the Public Service Commission (the 1st respondent) and the Government of Malaysia (the 2nd respondent) that his dismissal was unlawful, void and of no effect, that he was still a civil servant and that an enquiry be held to determine the salaries, emoluments and other benefits due to him. In the court below, he proceeded on only two grounds, namely:

(i) that the failure by the 1st respondent to give any reasons for the dismissal is against the rules of natural justice;

(ii) that there was a long and unexplained delay by the 1st respondent in initiating the disciplinary proceedings.

[7] In their defence the respondents disputed the appellant's claim that the dismissal was null and void, inoperative and of no consequence on the grounds canvassed by the appellant and contended that the dismissal was made in accordance with the General Orders and that there is no basis for the appellant to bring this suit.

Judgment Of The High Court

[8] The learned judge of the High Court dismissed the action and hence, this appeal. The trial in the High Court proceeded only by way of submission on documentary evidence, the appellant's counsel having opted not to call any witnesses. After the completion of his submission, counsel for the appellant made an oral application to amend the statement of claim to include another ground for nullifying the dismissal, namely, that the appellant was not given an opportunity to make a plea in mitigation before he was dismissed. The learned judge dealt with this application as follows:

> The application was prompted by the decision of the High Court in the *Utra Badi* case. The plaintiff's counsel submitted that although the plaintiff had made a plea in mitigation in his letter of representation, proper process required that he be given an opportunity to make a plea in mitigation after he was found guilty.

> The decision on the application to amend was postponed to await the ultimate appellate decision in the *Utra Badi* case. It has been ultimately decided by the Federal Court in *LembagaTatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 e-f, that "there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank". With that decision, the proposed amendment to the statement of claim would be an exercise in futility and I dismiss the application.

[9] In his grounds of judgment with regards to the first ground, *viz.*, failure by the 1st respondent to give any reasons for the dismissal, the learned judge said:

> I do not think that the failure in this case to give reasons for finding that the plaintiff had committed the alleged offences should have the consequence of nullifying his dismissal. The plaintiff had admitted that he did commit the offences. The failure to give reasons for finding him guilty could not have prejudiced him in his appeal to the Appeal Board, which could only have been an appeal as regards sentence and not as regards the finding of guilt. I say "could only have been" because the contents of the appeal is not in evidence.

[10] With regards to the second ground, *viz.*, on the issue of delay in initiating the disciplinary proceedings, the learned judge said:

> There was a lapse of about a year after the commission of the offences before disciplinary proceedings were commenced. The plaintiff relies by analogy on para (5) of the headnote to *Patto a/l Perumal v. Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 1 MLJ 255, which says:
>
> > (5) In order for the detention order to be valid, there ought to be proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at by the minister. An unexplained and long delay will be fatal to the plea of subjective satisfaction. In this case, there was a time lag of more than two years from the date of the last incident mentioned in the statement of allegations of fact up to the date of making of the detention order. Unless there was a satisfactory explanation for the delay, the subjective of the minister must be held to be not genuine or to be colourable.

That was an application for a writ of *habeas corpus* in a preventive detention case. I do not think that the analogy of unexplained delay rendering a detention order invalid in such a case can appropriately be applied to cases of dismissal from employment so as to produce the conclusion that mere unexplained delay nullifies a dismissal. There is no suggestion here of the existence of some element behind the unexplained delay, such as bad faith, that might nullify the dismissal.

The Appeal

[11] The appellant raised three grounds in his memorandum of appeal, namely:

(a) that the learned judge ought to have concluded, having regard to the facts and circumstances prevailing, that the appellant had a right to be heard in mitigation before he was dismissed and that he misdirected himself when he concluded that the proposed amendment to the statement of claim would be an exercise in futility and dismiss the application;

(b) that the learned judge ought to have concluded that the delay of one year in the commencement of disciplinary proceedings against the appellant after the commission of the alleged offence was fatal as no explanation was forthcoming from the respondent; and

(c) that the learned judge ought to have concluded that the delay adverted to in para 2 herein amounted to condonation of the alleged offences by the appellant, thereby precluding the respondent from instituting disciplinary proceedings against him.

Judgment Of The Court

[12] We had on 6 October 2008 dismissed the appeal with costs and affirmed all orders of the High Court. We further ordered the deposit be remitted to the respondents to account of taxed costs. Our reasons for dismissing the appeal follows.

Right To Mitigation Before Dismissal

[13] In his submission before us, learned senior federal counsel for the respondents pointed out that this point was only raised after the conclusion of the trial *vide* an application by the appellant's counsel to amend the pleadings. The learned judge

deferred his decision on the appellant's application to await the ultimate appellate decision in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi Perumal* [2001] 2 CLJ 525. In that case, the Federal Court held that there is certainly no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank and that, in fact, under O. 26(4) of the General Orders, the disciplinary board was not even required to make a finding of guilt. In *Utra Badi*, one of the questions posed before the Federal Court was as follows:

> Whether a show cause letter issued by a Public Service Disciplinary Authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art. 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard?.

In delivering the judgment of the court, Abdul Malek Ahmad FCJ said (at p. 551):

> Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para. (4) of General Order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

[14] In light of the decision in *Utra Badi*, we cannot fathom where the learned judge went wrong when he concluded that the proposed amendment to the statement of claim would be an exercise in futility and dismissed the application. The contention that the learned judge misdirected himself cannot stand at all.

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Delay

[15] The second ground raised by the appellant is with regards to the delay of one year in the commencement of disciplinary proceedings against him which he contend is fatal. He relied on
B *Patto Perumal v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 CLJ 42; [1989] 2 CLJ (Rep) 224 to support his appeal. The learned judge decided that the decision in *Patto*, which relates to an unexplained delay rendering a detention order invalid cannot appropriately be applied to cases of dismissal from employment so
C as to produce the conclusion that mere unexplained delay nullifies a dismissal. We agree with the learned judge.

[16] On the issue of delay, the appellant's counsel referred to *M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor* [2005] 3 CLJ 778. In *Sentivelu*,
D disciplinary proceedings against the appellant, a clerk in the Postal Department commenced in October 1984 in respect of offences committed by him between January and May 1977. The only point raised by the appellant at the appeal was that he was deprived of procedural fairness
E because of a seven year delay on the part of the respondent in bringing the charges against the appellant. This court held that the seven year delay had caused the appellant substantial prejudice especially in the absence of an oral hearing but this court was also of the view that it all depends on the fact of each case. In the
F instant appeal, the delay was only for about one year. The appellant admitted committing the offences which he was charged with. Further, there was no allegation of bad faith on the part of the respondents that might nullify the dismissal. Under such circumstances, we cannot see where the learned judge erred in his
G finding on this issue.

Condonation

[17] This issue seems to be related to the second issue discussed above, namely, the appellant is saying that the delay in
H commencing the action against him amounted to condonation of the alleged offences. Learned senior federal counsel for the respondents pointed out that this issue was never raised in the court below but that if the court is minded to deal with the issue, he submitted that this issue is without merit. He then pointed out
I that the decision of this court in *Sentivelu* has been set aside by the Federal Court on 23 September 2008 (see *Public Services*

Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 and that in delivering the judgment of the Federal Court, Zaki Azmi CJ opined that the delay *per se* is not a ground for holding that the disciplinary action should be held null and void and the decision be set aside. He also held that the delay did not amount to condonation.

[18] We would agree with the learned senior federal counsel that this issue of condonation is without merit. According to the *Concise Oxford Dictionary* (9th edn), the word "condone" means "to forgive or overlook (an offence or wrongdoing); approve or sanction, usu. reluctantly". The appellant's counsel argued that the appellant was transferred to another workplace after the incident. We fail to see how this move can be interpreted as amounting to condonation. There is no evidence that all was forgiven. Under the circumstances of this case, there cannot be condonation in any form whatsoever. As we have stated earlier, the appellant admitted committing the disciplinary offences and the decision of the disciplinary action was given after careful consideration of the show cause letter and his representation. Further, the second offence was a serious offence. Punching a person is tantamount to voluntarily causing hurt, an offence under the Penal Code. The appellant admitted that he punched his senior officer.

Conclusion

[19] Order 26(3) of the General Orders provides:

> If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

Order 26(4) of the same provides:

> If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

A Order 26(4) of the General Orders clearly provides that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on, *inter alia*, the dismissal of the officer. In his representation to the disciplinary authority,
B the appellant admitted having committed the offences that he was charged with. He then prayed for leniency and promised not repeat such offences in the future. Under these circumstances, we find no injustice has been occasioned. Punching a senior officer is indeed a serious offence.

C

[20] We find that the disciplinary proceedings conducted against the appellant were in compliance with the General Orders and that the learned judge was correct in holding that there were no improprieties in the disciplinary proceedings conducted against the
D appellant. As such, we see no reason why we should disturb the findings of the learned judge. For the aforesaid reasons we dismissed the appeal with costs and ordered the deposit to be remitted to the respondents to account of taxed costs.

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